IN THE

Supreme Court of the United States

October Term, 1970

No. ~~000~~ 70-31

PORT OF PORTLAND, *ET AL.*,
Appellants,

v.

UNITED STATES OF AMERICA, *ET AL.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON.

BRIEF FOR APPELLANTS

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No. 903

PORT OF PORTLAND, *ET AL.*,
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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON.

BRIEF FOR APPELLANTS

Opinion Below

The order and judgment of the three-judge Court for the District of Oregon is not reported and is reproduced in the Appendix (pp. 9-10). The report and order of the Interstate Commerce Commission (Commission or ICC) is published as *Spokane, Portland & Seattle Ry. Co. and Union Pacific R. Co.—Control—Peninsula Terminal Company*, 334 I. C. C. 419, decided June 6, 1969, and is also reprinted in the Appendix (pp. 11-68).

Jurisdiction

The judgment of the district court was entered on July 9, 1970, and appellants filed notice of appeal on September 1, 1970. This appeal was docketed on October 26, 1970, and probable jurisdiction was noted on February 22, 1971.

Questions Presented

1. Whether, in approving the acquisition of control (pursuant to § 5(2) of the Interstate Commerce Act) of a terminal railroad by two trunkline railroads without including two competitive railroads, the Commission applied erroneous legal standards in the following respects:

   (1) By limiting its consideration to one small part of the territory involved, ignoring the rapidly growing, transportation needs of an adjacent area which is part of the same metropolitan district;

   (2) By concluding that the applications of the two competitive railroads in the territory could not be granted because to do so would give every railroad in the area grounds for seeking to serve the customers of all other railroads in the area; and

   (3) By concluding that direct service by the two competitive railroads to the terminal railroad's industries would constitute an "invasion of the joint applicants' territory."

2. Whether the Commission's failure to include the Milwaukee Railroad in the proposed transaction is inconsistent with the basic requirement approved by this Court in the *Northern Lines Merger Cases*, 396 U. S. 491 (1970), that the Milwaukee be given the right to serve "all present and future industries at Portland."

3. Whether the Commission applied an erroneous standard of law in narrowly construing § 3(5) of the Interstate Commerce Act as requiring applicants for common use under that section to demonstrate that they are already entitled to serve the terminal facilities which they seek to reach.

Statutes Involved

There are set forth in Appendix A to this brief pertinent portions of the Interstate Commerce Act (the Act) involved in this appeal, §§ 5(2) (a) to (d), inclusive, 5(11), 3(4) and 3(5), 49 U. S. C. §§ 5(2) (a) to (d), inclusive, 5(11), 3(4) and 3(5), and the declaration of the National Transportation Policy stated in the preamble to the Interstate Commerce Act, 49 U. S. C. preceding § 1.

Statement

Rivergate Industrial District (Rivergate), a land area of nearly 3,000 acres and the last major acreage available in metropolitan Portland, Ore., is owned and under active development by the Port of Portland, a municipal corporation created in 1891 by the Oregon State Legislature. Lying strategically at the confluence of the Columbia and Willamette Rivers, Rivergate has about six miles of waterfront on the Columbia-Willamette system, the second largest river improvement in the United States. Substantial public monies have already been spent on the development, and the ultimate public and private investment is expected to exceed $500 million (App. 217-18, 227-29, 388).

The controversy before the Court concerns rail service to Rivergate by the four railroads serving Portland, Union Pacific Railroad Company (UP or Union Pacific), Spokane, Portland and Seattle Railway Company (SP&S),

Southern Pacific Transportation Company (SP or Southern Pacific) and Chicago, Milwaukee, St. Paul & Pacific Railroad Company (Milwaukee).[1]

By application filed July 25, 1967, SP&S and Union Pacific (joint applicants) sought authority to acquire control of Peninsula Terminal Company (Peninsula) through purchase of its entire capital stock in equal shares under § 5(2) of the Interstate Commerce Act, 49 U. S. C. § 5(2). Peninsula is a small independently owned terminal railroad about 3.79 miles in length located at North Portland, Ore., adjacent to Rivergate. In their application, the joint applicants state (App. 143-44):

> . . . [T]he River Gate Industrial Area in North Portland being developed by The Port of Portland Commission lies approximately one-half mile to the west of Applicant's physical connection to Peninsula. The northeasterly portion of said area is now reached by the western terminus of the tracks of Peninsula, and proposed acquisition will enable Applicants to provide rail service to said industrial area over the lines of Peninsula. . . . .
>
> No major changes in traffic or revenues are anticipated in the immediate future; however, it is anticipated that within the foreseeable future substantial new traffic and revenues will be derived as a result of the development of the said River Gate Industrial Area by The Port of Portland Commission.

[1] At the time of the hearings in early 1968, the Milwaukee was not serving Portland directly, but extended its operation to the area on March 22, 1971 as a result of the condition attached to approval of the Northern Lines merger. Northern Lines Merger Cases, 396 U. S. 491 (1970), aff'g Great Northern Pacific & Burlington Lines, Inc.—Merger, Etc.—Great Northern Railway Company, 331 I. C. C. 228 (1967), 331 I. C. C. 869 (1968). Burlington Northern Inc. has succeeded SP&S as a result of the Northern Lines merger.

Rivergate is being developed by the Port of Portland and already has located within its boundaries five industries, four on the Willamette River or west side and the fifth on the Columbia River or east side. A schematic map showing the locations of the various facilities here involved is attached at the end of this brief. Peninsula's facilities on the east side provide one of two possible rail access routes to Rivergate. The other route on the west side extends from UP's Barnes Yard (No. 9 on the map) over a track jointly owned by UP and SP&S to the Rivergate property line where it connects with the Port's track to the industrial properties. The Port owns all tracks within Rivergate except those on industry owned property. UP now provides rail service for the account of itself and Burlington Northern over these facilities. If the proposed transaction is approved without inclusion of SP and Milwaukee, direct rail service to Rivergate will be restricted to the two joint applicants.

Subsequently, the Milwaukee and the Southern Pacific each sought inclusion as equal owners in the proposed transaction pursuant to § 5(2) (d) of the Act, 49 U. S. C. § 5(2) (d). In their petitions for inclusion, Milwaukee and Southern Pacific each requested also the grant of the use of certain trackage so as to provide direct access to and from Peninsula. Milwaukee also requested common use of intervening interchange tracks at North Portland as terminal facilities under § 3(5) of the Act, 49 U. S. C. § 3(5).

SP (shown in orange on the map) comes into Portland from the south and has an interchange with UP at East Portland (No. 5 on the map) and with the Burlington Northern at Hoyt Street (No. 3 on the map). As agent for UP, SP now takes its cars to and from UP's Albina

Yard (No. 6). The right to use tracks sought by SP extends from East Portland (No. 5) to the UP and BN connections with Peninsula at North Portland (No. 7). The distance over UP from the North Portland interchange tracks to the north end of Albina Yard is 5.2 miles. (App. 407, 399.)

In separately filed applications at ICC Finance Docket Nos. 24890 and 24891, Southern Pacific sought authority requiring common use of the terminal facilities of Peninsula and use of the Union Pacific's main line tracks from the SP-UP track connection at East Portland, Ore., to the tracks of Peninsula in North Portland, and, in the alternative, the common use of the terminal facilities of Union Pacific between Peninsula and the SP-UP connection at East Portland.

The several applications and petitions were heard on a consolidated record before a hearing examiner at Portland from February 26 to March 1, 1968, inclusive. The public bodies (the Port of Portland and Sam R. Haley, Public Utility Commissioner of Oregon, both appellants here), intervened and presented extensive evidence to protect the public interest in providing Rivergate with adequate, efficient and economic rail service by the four linehaul railroads serving Portland, namely, Burlington Northern (SP&S), Union Pacific, Southern Pacific and Milwaukee.

On September 24, 1968, in a 65-page report (App. 69-135), the hearing examiner recommended approval of the acquisition of control proposed by SP&S and UP subject to conditions providing for (1) inclusion, as equal owners, of Southern Pacific and also Milwaukee upon consummation of the Northern Lines merger and the filing by Milwaukee of an application to extend its operation to Portland and (2) the right of access by Southern Pacific and Milwaukee

over certain trackage to reach Peninsula. The examiner also recommended approval of the Southern Pacific's § 3(5) applications (Finance Docket Nos. 24890 and 24891) providing for common use by Southern Pacific of tracks and facilities of Union Pacific for operation between the UP-SP connection at East Portland and the Peninsula tracks at North Portland.

After the filing of exceptions to the examiner's recommendations and replies thereto, the Commission, by Division 3, approved acquisition by SP&S and UP of control of Peninsula through purchase of all its capital stock and denied the authority and the relief sought by Southern Pacific and Milwaukee. *Spokane, Portland & Seattle Railway Co. and Union Pacific Railroad Co.—Control—Peninsula Terminal Co.*, 334 I. C. C. 419 (1969).

Petitions for reconsideration were filed by the Port, the Oregon Commissioner, Southern Pacific, Milwaukee and Crown Zellerbach Corporation, an affected shipper. On October 24, 1969, Division 3, acting as an Appellate Division, denied the several petitions. Thereafter petitions were filed to take the case to the entire Commission. These petitions were denied by order dated November 21, 1969.[2] Suit was then filed by the Port and the Oregon Commissioner in the United States District Court for the District of Oregon, where the other appellants here intervened as plaintiffs.

The United States, the nominal defendant, filed a brief supporting plaintiffs and participated in the hearing. It contended that the Commission's decision should be set aside and the action remanded to the Commission for correction of errors committed.

[2] On December 8, 1969, the Commission postponed the effective date of its order of June 9, 1969, authorizing the proposed transaction until further order.

Throughout this period, the *Northern Lines Merger Cases* were in the course of decision. On November 20, 1968, the United States District Court for the District of Columbia affirmed the ICC's approval of the merger which the Commission made subject to Condition 24(a) providing for the Milwaukee's ultimate entry to Portland upon consummation of the merger. *United States v. United States*, 296 F. Supp. 853 (D. D. C. 1968). Then on February 2, 1970, prior to the hearing before the District Court in the present case, this Court affirmed the merger in *Northern Lines Merger Cases*, 396 U. S. 491.

On July 9, 1970, after the filing of briefs and after hearing the parties here involved, the Oregon District Court entered its two paragraph order and judgment in which it made a finding that the Commission's report and orders are supported by substantial evidence and are neither arbitrary nor capricious, affirmed the orders of the Commission, and dismissed the action without opinion. (App. 9-10.)

Appellants in this Court are the Port of Portland, the Oregon Public Utility Commissioner, Southern Pacific and Milwaukee. All join in this brief, though an additional brief directed primarily at one aspect of this litigation, is also being filed by Milwaukee.

ARGUMENT

Summary

1. This case involves interpretation of §§ 5(2) and 3(5) of the Interstate Commerce Act. The basic application was filed under § 5(2). The test under that section is whether the proposed transaction will be consistent with the public interest. Appellants submit that the Commission's determination of the public interest is defective in several respects, and that, accordingly, the district court's judgment affirming the Commission's decision should be reversed and the case remanded.

A. The hearing examiner recommended that all four railroads be included in the § 5(2) transaction. He further recommended that SP and Milwaukee be given access to Peninsula and that SP's common use applications under § 3(5) be granted. The Commission, however, reversed all these recommendations and concluded that control of Peninsula should be limited to UP and SP&S. Central to these differing results is the fact that the hearing examiner considered Portland to be the relevant transportation area, whereas the Commission limited consideration to Peninsula, a small part of the Portland area.

By so doing, the Commission ignored what this case is all about—rail service to Rivergate, a 2,942 acre port and industrial complex which is being developed by the Port of Portland and, which, when fully developed, is expected to generate 5,000,000 tons of rail freight annually. The Commission neglected to consider the public benefit which would flow from direct access to Rivergate by all Portland linehaul railroads. In short, the Commission failed to take into account all relevant factors affecting the public interest.

B. The Commission's denial of the requests for inclusion by SP and Milwaukee was in large part based on its conclusion that if it allowed those lines in, it "would be providing grounds for every railroad in the undefined Portland area to seek to serve the stations and industries of any or all other railroads." This conclusion is wholly without foundation. The proceeding here is based on an application for approval of acquisition of control under § 5(2) and on the Commission's power under that section to impose whatever conditions are "just and reasonable" or to include other railroads when in the "public interest." These are the grounds on which SP and Milwaukee seek inclusion and access, not the fact that they are "present" in Portland. Moreover, it should be emphasized that all that Milwaukee and SP seek to obtain in this proceeding is direct access to Rivergate. Authority to serve other parts of Portland would require the institution of additional proceedings and would afford the Commission adequate opportunity to deal with that situation if and when it arises.

C. The Commission found that direct service by SP and Milwaukee to Peninsula would constitute an "invasion of the joint applicants' territory." In so finding, the Commission assumed that UP and SP&S, by connecting with Peninsula (an independent terminal carrier), acquired an exclusive right to serve Peninsula's industries. This assumption is invalid, is contrary to decisions under other sections of the Act, and wholly ignores the competitive situation at Portland as it relates to Rivergate.

2. One of the conditions imposed in the *Northern Lines Merger Cases* was that the Milwaukee be permitted to extend its operations to Portland and that it be granted trackage rights over Burlington Northern, including "the

right to serve on an equal basis all present and future industries at Portland." This condition was critical to administrative approval of the Northern Lines Merger and to ratification of that action by this Court. Yet the Commission's exclusion of Milwaukee in this proceeding is in direct conflict with the condition.

3. Under § 5(11) of the Act, in passing on a § 5 transaction, the Commission is required to consider anticompetitive effects. However, in this case, the Commission wholly failed to discharge its obligation in this respect, making no attempt whatever to inquire into the effect of the proposed transaction on competitors or on the shipping public.

4. The Commission rejected applications by SP and Milwaukee under § 3(5), construing that section as requiring the applicants to show that they are already "entitled to serve" the particular terminal facilities which they seek to reach. This restrictive interpretation of § 3(5) is contrary to the language of the statute and to the Commission's own decisions in other cases.

1. The Commission applied erroneous legal tests in determining the public interest.

Under § 5(2) of the Act, 49 U. S. C. § 5(2)(a), one railroad or two or more jointly may acquire control of another railroad through purchase of its capital stock with the approval and authorization of the Commission as provided in subparagraph (b). That subparagraph provides for the filing of an application with the Commission, and approval of a proposed transaction is granted if the Commission finds that the proposed transaction will be consistent with the public interest.

As related to rail unifications and acquisitions of control under § 5(2) of the Act, this Court in *New York Central Securities Corp. v. United States*, 287 U. S. 12, 25 (1932), said that the term "public interest"

> is not a concept without ascertainable criteria, but has a direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred.

The key to the intense interest shown by so many parties in this proceeding is the presence and the present and future development of the publicly owned industrial area called Rivergate. Adequate rail service to Rivergate is a matter of absolute necessity for its full development. In determining the public interest, the ICC not only failed to give adequate consideration to Rivergate and its needs but also followed other erroneous legal standards in its determination of the public interest. These matters we consider in the next three subsections.

A. The Commission erred in limiting its consideration to Peninsula.

In its decision, the Commission refers to the hearing examiner's consideration of the entire Portland territory as "an industrial transportation area which in considering the public interest can be treated only as one transportation terminal entity." In his view, "divisive determinations would result in multiple problems and prolonged litigation not conducive to the future welfare, growth and development of the Portland area" (App. 116-17). The Commission's conclusion is that it would "consider Pen-

insula, rather than the entire Portland area, to be the focus of our attention here in resolving the public interest factor" (App. 30). This narrow view, we respectfully urge, totally disregards the great public interest in the development of Rivergate as a key project in the present and future commercial and industrial development of Portland, the State of Oregon, and in truth the Pacific Northwest.

Portland, a major deep-channel seaport, transportation and distribution center, serves the Pacific Northwest as well as the continental United States. Rivergate is a vital part of the future industrial and economic development of the area (App. 220-32, 215-16). Peninsula, the terminal carrier to be acquired, is, in the words of the hearing examiner, a "potential connection with a proposed Rivergate rail system and the impetus for unusual carrier, industry, and public interest in these proceedings" (App. 74) Rivergate lies partly within, and partly adjacent to, the city of Portland. Burlington Northern (SP&S) and UP each describe the Portland Switching District as including both North Portland and Rivergate. Rivergate is also within the Portland Commercial Zone established by the Commission for motor carriers under Part II of the Interstate Commerce Act. (App. 343-45, 348, 351-56, 212.)

Additionally, from the standpoint of railroad operations, UP and Burlington Northern (SP&S) switch cars to and from North Portland for interchange with Peninsula. There, like several other terminal railroads in the Portland Switching District, Peninsula provides the switching between its connection with the Portland trunklines (North Portland) and its on-line industries.[3]

[3] Peninsula is the only terminal railroad at Portland not owned by trunk lines serving Portland at the time of the hearings. The other terminal lines are Portland Traction Company and Portland Terminal Company, both shown on Dench's sketch map (App. 331, 343-345, 355-56).

The Commission, appellants submit, should have considered Peninsula as a switching facility forming an integral part of Portland Terminal Area and Switching District and particularly as a potential means for serving Rivergate and the industries now and later located there. It should have determined how Rivergate's rail service can be best provided in the public interest and how Peninsula can be best utilized by and in conjunction with the Portland trunk lines to accomplish this function.

Rivergate's importance permeates the record.[4] Its waterfront properties permit the use of the 100-mile channel connecting the Port of Portland with the Pacific Ocean. Oceanborne traffic moves in large volume through the Port, and there is great potential for additional water traffic. (E.g., App. 207-11, 215-16, 218, 220-27, 230-32, 240-42, 405.)

Traffic estimates for Rivergate are presented by the Port's consultant, and no evidence in opposition to his estimates was presented. At full development, 500-600 freight cars per day will be handled to, from, or within Rivergate. Translated to volume measures, this means a movement of 40,000 tons of rail freight as a weekday maximum or 20,000 tons per day as a weekday average. The volume will eventually reach 5,000,000 tons of rail traffic annually (App. 207-8). Even today, Rivergate is generating substantial traffic, and the district is developing apace.[5]

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[4] In the Northern Lines Merger Cases, this Court observed that Milwaukee's past failure to become a meaningful competitor came in large part because its lines did not reach Portland or the southwest terminal of the Northern Lines in California. 396 U. S. at 515.

[5] The development of Rivergate is thoroughly discussed in petition filed by the Port of Portland for reconsideration and further hearing before the Commission. This petition filed August 5, 1969, is part of Volume II of the documents filed with the ICC as certified by the Commission's Secretary.

Significantly, the Commission, in determining the public interest, did not discuss the huge traffic potential at Rivergate and erroneously concluded to consider only Peninsula Terminal as it now exists. Thus we find that the Commission considered not Rivergate's present and potential traffic, but Peninsula's declining traffic (3,640 loaded cars in 1966 and 2,748 cars in 1967) and the share of that traffic handled by Milwaukee and SP through connections and the use of joint rates and through routes (App. 31).

The needs of Rivergate shippers and of the shipping and consuming public and how each of the proposals before it would affect the rail competitive situation should have dominated the Commission's consideration of the issues. Throughout the proceeding, the public bodies have urged that Rivergate is not the captive province of any one or two railroads, but is an open public facility under development by the Port. Its maximum development as a major industrial and freight interchange area requires economic, fast and reliable freight service provided by all the Portland line-haul railroads individually and as a group. If, indeed, the Commission had considered the effect of the proposed transaction upon adequate transportation service to the public as required by § 5(2)(c) of the Act, the Court would find in the Commission's decision consideration of the rail routes and service available to Rivergate shippers, the switching situation in the terminal area of Portland and its relation to Rivergate, the provision of facilities permitting modern rail service to Rivergate as it develops, car supply, competition among the railroads, and other matters bearing on the adequacy of rail service. Because of its refusal to consider Rivergate in determining the public interest, the Commission's decision is necessarily silent on these matters.

The record, however, shows that direct access to and from Rivergate by all Portland linehaul railroads, including Milwaukee, makes possible adequate and efficient rail service by eliminating delays, by enabling the use of the new rail technologies, by providing healthy competition, and by maximizing the number of single-line or single-carrier routes to and from Rivergate. If the four Portland railroads become the joint owners of Peninsula, single-line routes will be available to and from almost every point in western United States producing or receiving Portland/Rivergate traffic; competitive routes and service will be available to Rivergate shippers throughout the area west of Chicago and along the West Coast. (App. 319, 321, 204-6.) For example, shippers and receivers in northern and central California, Arizona, New Mexico and Texas will have direct, single-line service to and from Rivergate. The Commission in its decision lists the states in which the Portland railroads operate (App. 16-17), but does not discuss either the additional single-line service provided or the competition among these railroads.

If SP and Milwaukee jointly own and have direct access to Peninsula, single-line coverage will be greatly expanded, all to the benefit of the public, and it can be truly said that Rivergate as a public facility will have available to shippers located there comprehensive and competitive rail service necessary for its proper development.

In *Chicago & N. W. Ry. Co.—Purchase—Minneapolis & St. L. Ry. Co.*, 312 I. C. C. 285 (1960), as well as in other decisions, the Commission recognized the benefits of single-line service at page 294:

> The single-line haul makes available a wider source of supply for transit shippers in this service area, reduces time consuming and costly interchanges, and provides greater flexibility in rate making—all to the benefit of the public generally.

The public need for direct access to all the Portland railroads is clear from the testimony of various shippers in the proceeding. These included Collier Carbon and Chemical Corp., a chemical company; Crown Zellerbach Corp., the second largest producer of paper and paper articles in the nation; and Oregon Steel Mills, the first steel plate mill in the northwest which was in course of construction at the time, time of the hearings. The examiner fairly abstracts their testimony in detail (App. 105-9), but the Commission treats this evidence in a somewhat slighting fashion in its decision (App. 21, 31-33, 61-65). The important point overlooked by the Commission is that these were *Rivergate* shippers supporting the need for direct service to Rivergate by Southern Pacific through the Peninsula gateway. The Commission lamely dismisses their testimony, but there is nonetheless unrefuted proof that direct service to Peninsula would result in wider single-line service, less switching of cars, less handling of freight, less likelihood of damage, less time in transit and in terminals, and easier tracing of shipments.

Furthermore, from the Port's point of view, SP's exclusion from Rivergate presents difficult handicaps for its development. In this respect, the Southern Pacific's manager of industrial development considered a direct connection by SP with Peninsula a necessity if it expects to locate industry in Rivergate. He said (App. 509-10):

> Q. Now, if the Southern Pacific has the right to connect directly with the Peninsula Terminal Railroad, would the Southern Pacific under those circumstances attempt to locate industry in the Rivergate area?
>
> A. Yes, it would.
>
> Q. Would you state why that would be so?
>
> A. The Rivergate Industrial area is unique in many ways. First, here we have an area in the close

proximity of a metropolitan area which contains several thousand acres of industrial property uniquely located on deep water and in addition it is publicly owned. We feel that the success of such a large industrial development will largely depend upon the flexibility which is given as far as rail service is concerned. I think we must recognize here that some of the major markets served, to be served by the industrial production and industrial growth of the Rivergate area will be in California and the Southwest areas which are served by the Southern Pacific lines. Therefore, we feel that the success of the area, the Rivergate area will be largely dependent upon S. P. service being given.

Q. Now, if the Southern Pacific does not have direct access to the Peninsula Terminal would that same incentive be present for the locating of industries in the Rivergate area by Southern Pacific?

A. No, it would not.

Q. Would you explain why not?

A. Well, the basic one is that by having direct service to the Rivergate area we know what kind of service we can give to the industries, we can assure them of a specific service and the service they need by not having that access obviously we cannot assure them of that service and we would not feel as strongly about locating industries there.

SP&S's traffic manager on cross examination confirmed the view of SP's manager of industrial development (App. 436):

Q. If a railroad did not have direct access to the Rivergate area in your view as an expert traffic man, would they have the same incentive for . . . locating industry in the Rivergate area?

A. I doubt it.

The Commission refused to consider this evidence just as it refused to consider evidence relating to Rivergate's importance, its traffic potential, its transportation needs, its rapid development and other factors bearing on the issues. Inclusion of SP and Milwaukee not only will assure the rail service needed by Rivergate shippers but will also promote the development of this important public facility.

By confining its consideration of public interest solely to Peninsula, the Commission thereby ignored the public benefits flowing from the improvements in rail service to Rivergate made possible by approval of the requests of Milwaukee and SP. The Port's consultant, Dr. E. Grosvenor Plowman, succinctly discussed terminal switching at Portland as it relates to Rivergate. An essential link in good rail service, he said, is the fast and efficient handling of trains and cars in terminal areas. The old fashioned method of uncorrelated transfer of freight cars from one carrier to another within the switching district will not provide Rivergate with the rail service it needs. Rivergate and North Portland where Peninsula operates are within the Portland Switching District. In terminal areas with complex switching such as Portland, the rhythm of one switching operation is so out of step with the next in the chain that a minimum of 24 hours is consumed for each transfer. Thus cross-Portland switching of cars may take as much as three to four days (App. 212-13).

Approval of the Milwaukee and SP requests makes possible not only the elimination of switching delays on their traffic to and from Rivergate, but also the use of the more advanced railroad technologies.

In this respect in the record here, Dr. Plowman testified (App. 209-10):

> Rivergate, a new facility with potential for all types of traffic, presents a major opportunity for use of new technology in rail terminal service. In fact, this new technology must be used if Rivergate is to realize its potential. Unit and semi-unit trains eliminate nearly all or a substantial part of the time wasted in terminals by freight cars and their cargo. In its ultimate form, the unit train of 100 or more specially designed cars moves loaded in one direction and empty in the other between two highly mechanized terminals. These terminals load and unload the never-uncoupled cars as they move slowly through the loading and unloading facilities. Under optimum conditions, the unit train moves directly through terminal areas to and from loading and unloading facilities without switching delays. Groups of cars in linehaul semi-unit trains require some terminal switching, but switching economies are available if the semi-unit train moves directly through terminal areas to and from tracks adjacent to the loading and unloading facilities.

The Commission's failure to consider relevant evidence pertaining to Rivergate springs from its refusal to evaluate all matters affecting the public interest. Portland is a city and a port of major commercial importance. It has a recognized metropolitan district. In the railroad world, it has a well established switching district within which lie Peninsula and Rivergate (App. 345, 351-52, 355). The Commission was duty bound to consider the interests of Portland as a transportation entity, Rivergate as a new area within the district, and Peninsula as the independent carrier to be acquired. The Commission has frequently held that in § 5 proceedings all matters of all kinds affecting the public interest should be considered.[6] In this case,

[6] For typical cases in which the Commission has considered the interests of all parts of the public in determining the public interest, see City of Hialeah, Fla. v. Florida East Coast Ry. Co., 317 I. C. C. 34, 36 (1962); Detroit, T. & I. R. R.—Control, 275 I. C. C. 455, 488 (1950); Watson Bros. Transp. Co., Inc.—Purchase—West Coast Fast Frt., 57 M. C. C. 745, 758 (1951); and Chicago, B. & Q. R. R. Control, 271 I. C. C. 63, 145-46 (1948). *Cf.* St. Louis SW Ry. Co.—Purchase—Alton & S. R. R., 331 I. C. C. 515, 538 (1968).

however, it has failed to give proper consideration to the public interest by ignoring Rivergate and its needs. It should be called upon to consider the public interest in all its aspects in the consolidated proceedings before it.

B. The Commission erred in concluding that inclusion of Southern Pacific and Milwaukee would provide grounds for every railroad in the Portland area to seek to serve the stations and industries of any or all other railroads in that area.

In support of its denial of the Milwaukee and SP requests for inclusion and access to Peninsula and its refusal to consider Rivergate, the Commission relied on an erroneous standard which destroyed fair and reasonable consideration of the issues. It said (App. 30, 334 I. C. C. at 432-33):

> We cannot conclude, however, that the mere presence of SP, and the prospective presence of Milwaukee, in the general Portland area give them the right to serve all industries anywhere within that undefined geographical area. *Cf. Nashville, C. & St. L. Ry. Construction,* 295 I. C. C. 363, 377. If we were to adopt the hearing examiner's conclusion, we would be providing grounds for every railroad in the undefined Portland area to seek to serve the stations and industries of any or all other railroads.

For several reasons, this standard, which is basic to the Commission's conclusion, is erroneous and utterly without substance. First, neither Southern Pacific nor Milwaukee has claimed that inclusion in the proposed transaction or use of tracks for direct access to Rivergate should be granted because of their mere presence in Portland; nor have they contended that consideration of the Portland area in evaluating the public interest would open up all stations and industries on any or all other railroads in Portland.

The issues here spring initially from the requests of Southern Pacific and Milwaukee for inclusion in the proposed transaction under § 5(2)(d) of the Interstate Commerce Act. That section provides that in the case of a proposed transaction involving railroads under § 5(2), the Commission is authorized as a prerequisite of its approval of the proposed transaction to require, upon equitable terms, the inclusion of other railroads in the territory involved, upon petition by such railroads and upon a finding that the inclusion is consistent with the public interest. We should note also that under § 5(2)(b), 49 U. S. C. § 5(2)(b), the Commission is empowered to subject its approval of a § 5(2) proposed transaction to such terms and conditions as it finds to be just and reasonable, and consistent with the public interest.[7]

But whether a railroad proceeds through an inclusion petition under § 5(2)(d) or seeks terms and conditions pursuant to § 5(2)(b), a § 5(2) application must first be presented, and the Commission can then determine the question of inclusion and the imposition of reasonable terms and conditions. Under such a procedure prescribed by law, there certainly is no opportunity for shotgun terminal expansions.

Second, neither Southern Pacific nor Milwaukee requested the right to serve stations and industries on all railroads in the Portland area or in the Portland Switching District; nor has any appellant contended that such a right is sought in these proceedings or would result from approval of the SP and Milwaukee requests. The Commission was aware of the railroad requests. It summarized the Southern Pacific's requests as follows (App. 19, 334 I.C.C. at 425):

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[7] See Atlantic C. L. R. Co. v. United States, 284 U. S. 288, 294-295 (1932), aff'g 48 F. 2d 239, 244 (W. D. S. C. 1931) and M & M Transportation Co. v. United States, 128 F. Supp. 296, 298 (D. Mass. 1955), aff'd, 350 U. S. 857 (1955), for examples of the broad exercise of this power.

> . . . SP requests a condition to approval of the SP&S-UP application providing for its inclusion as an equal joint partner in the ownership of Peninsula and as a condition to such ownership, trackage rights over UP's main line and the terminal trackage between Peninsula and the SP-UP track connection at East Portland.

As to the Milwaukee, the Commission said (App. 18, 334 I.C.C. at 424):

> Contingent upon the extension of its operations to Portland pursuant to the *Northern Lines* case, Milwaukee requests joint and equal ownership of Peninsula's stock with the other trunklines and considers joint ownership of Peninsula essential to its Portland operations insofar as the industries located on Peninsula and in Rivergate are concerned.

Third, the granting of the Milwaukee and Southern Pacific requests will authorize no more than inclusion in the proposed transaction and direct access to Peninsula. There certainly is attached to that authority no right to serve any area other than Rivergate. If either railroad should seek authority beyond that requested, appropriate proceedings would have to be instituted or would ensue, and the Commission is clothed with ample power to deal with the Portland terminal situation and its rail service.

Nashville, C. & St. L. Ry. Construction, 295 I.C.C. 363 (1956), which the Commission cites in support of its "mere presence" theory, is not apposite to the situation here. *Nashville* involved an extension of a rail line for which authority was sought under § 1(18) of the Interstate Commerce Act, 49 U.S.C. § 1(18). The question there was whether a short span of track was an extension of line or spur or industrial tracks exempt from certificate requirements under § 1(22) of the Act. The Commission referred

to the doctrine of *Texas & P. Ry. Co. v. Gulf C. & S. F. Ry. Co.*, 270 U. S. 266 (1926) holding that a short span of track, though like a spur or industrial track, may constitute an extension of line requiring certification. *Nashville* did not involve issues growing out of requested inclusion under § 5(2)(d) or conditions under § 5(2)(b) of the Act. It spoke of "mere presence" and "invasion of territory" in the context of a § 1(18) extension case. We shall speak to the "invasion" matter in the next subsection of the argument. But insofar as the present issues of inclusion and direct access are concerned, *Nashville* is not in point.

In sum, the Commission erroneously concluded that treatment of the entire Portland area as one transportation entity would in effect allow every railroad in the undefined Portland area to serve the stations and industries of any or all other railroads. This faulty conclusion based on an erroneous legal standard led to the Commission's gross and arbitrary misjudgment of the public interest.

C. The Commission erred in concluding that direct service by SP and Milwaukee to Peninsula's industries would constitute an invasion of the territory of the joint applicants (UP and Burlington Northern).

In the decision at issue, after determining to limit its consideration solely to Peninsula, the Commission proceeded to find that

> . . . since neither SP nor Milwaukee now connect with Peninsula, and have never connected with it in the past, their direct service to Peninsula's industries over the objections of SP&S and UP would constitute a new operation and an invasion of the joint applicants' territory (App. 30, 334 I. C. C. at 433.)

Implicit in this conclusion is the assumption that UP and SP&S, by connecting with an independent switching

carrier, thereby acquire the right to serve the independent carrier's industries to the exclusion of all other railroads in the area. This assumption is invalid.

Any application for control of a carrier under § 5(2) of the Act constitutes a voluntary submission to the Commission's inclusion and conditioning powers. If the applicants do not wish to be subjected to the conditions imposed, they can simply refrain from consummating the transaction. The inclusion power and the corollary conditioning power to provide direct access are clearly intended to bring railroads operationally and otherwise into territories served by the carrier to be acquired. In this respect, except for the permissive character of an order approving control, inclusion/access cases are similar to applications by railroads for certificates authorizing the construction or extension of lines into areas served by other railroads. In that type of case, the law has long been settled that carriers have no legal right to exclusive occupancy of a territory. *Pennsylvania R. Co. v. United States,* 40 F. 2d 921, 925 (W. D. Pa. 1930); *Indian Valley R. R. v. United States,* 52 F. 2d 485 (N. D. Cal. 1931); *Chesapeake & O. Ry. Co. Construction,* 267 I. C. C. 665 (1947); *Oregon Short Line R. Co. Construction,* 282 I. C. C. 741 (1953).

Rivergate, the center of this controversy, is a development of the Port undertaken after thorough study at great expense. The land was bought and reclaimed over a period of nearly 30 years. Originally in large part low lying marshes subject to flooding at various times of the year, the area is being rapidly reclaimed and filled with spoil materials from the Port's dredging operations in the rivers. The Port owns all the railroad track within Rivergate and considers that the area is not the exclusive domain of any one or two railroads but is rather a public facility for

which the service of all four Portland railroads is required. (App. 227-28, 214-15, 203-4, 232.)

Considering the circumstances, the public bodies respectfully submit that neither Burlington Northern, Union Pacific nor Peninsula has any legal right to exclusive occupancy and access to Rivergate. Certainly neither Burlington Northern nor Union Pacific should be able to lock up Rivergate and gain an unjustified advantage at the expense of the public, Rivergate shippers and the taxpayers.

The Commission should have followed the rule that no carrier has a legal right to exclusive access to or occupacy of a territory.

Illustrative of the rule is *Pennsylvania R. Co. v. United States,* 40 F. 2d 921 (W. D. Pa. 1930), the district court affirmed the granting of a certificate of public convenience and necessity permitting the applicant railroad to serve a manufacturing area previously served by another railroad. The Court said at page 925:

> It is equally certain that the written law—the Transportation Act of 1920—does not explicity or implicitly accord a noncompetitive traffic area to the first taker as the law accords a trademark to the first adopter. Instead of doing this the written law negatives such a right by providing expressly for the invasion by one carrier into a territory exclusively served by another on a showing of convenience and necessity of more transportation service for those inside reaching out and those outside reaching in.

In the present situation, no party has seriously contested the Port's evidence concerning the huge traffic potential at Rivergate, and there is the voluminous evidence discussed above relating to the strong need for direct

access by all the Portland railroads to Rivergate. But, here again, we find that the Commission confined its consideration to Peninsula and specifically referred to "direct service to Peninsula's industries" in its discussion of the invasion question (App. 30, 334 I. C. C. at 433).

We emphasize that § 5(2)(c) of the Act requires the Commission to consider, among other things, "the effect of the proposed transaction upon adequate transportation service to the public." In this connection, the Commission refers to the rule that "a railroad now serving a particular territory should normally be accorded the right to transport all traffic therein which it can handle adequately, efficiently, and economically, before a new operation should be authorized" (App. 31). *Cf. Northern Pacific Ry. Co. Construction,* 295 I. C. C. 281, 294 (1956) and *Minneapolis, St. P. & S. S. M. R. Co. Acquisition,* 295 I C. C. 787, 802 (1958). The Commission misapplies this rule.

The record contains a profusion of evidence concerning the deplorably poor quality of service to and from Peninsula industries. The Commission avoided any discussion of this evidence. Southern Pacific cars for Peninsula are handled in switching service between UP's Albina Yard and the North Portland interchange, a distance of 5.2 miles. A direct movement between Albina and the North Portland interchange can be made in about 45 minutes (App. 407). In fact, the average transit time was 30 hours or more. Witnesses for the joint applicants and others were in unanimous agreement that the transit time of 30 hours or more was not adequate service. The Commission does refer to evidence offered by three Rivergate shippers supporting SP, as well as evidence offered by SP and Milwaukee themselves, and concludes that it fails to establish that the joint applicants, through con-

trol of Peninsula cannot handle present and future traffic in the Peninsula territory adequately, efficiently, and economically (App. 33, 334 I. C. C. at 435). Laying aside any question concerning this testimony by the Rivergate shippers and the fact that the testimony related to Rivergate, we respectfully submit that the Commission erroneously refused to consider the undisputed evidence that UP and SP&S are not providing adequate and efficient service to Peninsula. We turn to a brief review of that evidence.

UP's general manager admitted that it took about 30 hours for SP cars to move from Albina to the North Portland interchange (App. 398). UP's operating witness also concurred in the 30-hour transit time for the 5.2 mile movement (App. 577). Using a 10 percent random sample, Ordway's Exhibit 45, presented by SP, indicates that the elapsed time between Albina and the North Portland interchange exceeded the transit time of 30 hours conceded by UP's witnesses. (App. 315-17).

Other witnesses called by joint applicants agreed that the Albina-North Portland service was inadequate. SP&S's vice president and general manager said frankly that as an operating man he would not be satisfied with transit time of over 24 hours for a movement of six miles (App. 366). Its traffic manager testified (App. 431):

> Q. Is it your belief that 30 hours or more to from Albina to the North Portland interchange is adequate service to the public?
>
> A. I think any railroad man would like to improve it.
>
> Q. Will you answer my question, do you believe that is adequate service to the public?
>
> A. No, sir.

A representative of the Brotherhood of Railway Clerks said that he certainly did not consider "30 hours a reasonable time and adequate service to move cars a distance of about 5.2 miles" (App. 552). A receiver of freight located on Peninsula testified that he did not consider transit time of 37 hours from the time UP received a specific car to interchange with Peninsula as being adequate service for a distance of 5.2 miles (App. 488-89).

In his report, the examiner referred to "the almost incredible 30-hour transit time required for car movements between Albina Yard and Peninsula" (App. 123). He said that "the 30 hour transit time remains unsatisfactory, and greater efforts in the public interest must be found to expedite movements between those points" (App. 123-24).

The Commission arbitrarily disregarded the clear evidence of admittedly inadequate service for the transportation of present traffic to and from Peninsula. Thus its finding relating to adequacy of service in the territory is without a rational basis.

In brief, apart from its failure to consider Rivergate, the Commission has erroneously and arbitrarily applied the law relating to invasion of territory, protection of existing carriers (UP and BN), and the effect of the proposed transaction on service. These errors reflect also its failure to consider the rail competitive situation at Portland as it relates to Rivergate. This aspect of the case we consider in the next two points of this argument.

2. The Commission's refusal to implement the Portland Condition in the Northern Lines Merger Cases is arbitrary, erroneously excludes the Milwaukee from direct access to the Rivergate Industrial District, and nullifies an essential basis on which this Court approved the Northern Lines unification.

In *Northern Lines Merger Cases*, 396 U. S. 491 (1970), this Court had before it orders of the Interstate Commerce Commission approving the unification of the so-called Northern Lines and three subsidiaries, one being the SP&S, into Great Northern Pacific & Northern Lines, Inc. (now called Burlington Northern Inc.). The ICC first disapproved the proposed unification, 328 I. C. C. 460 (1966), but later, on reopening, authorized it, 331 I. C. C. 228 (1967). Between the Commission's first and second decisions, the Northern Lines and the Milwaukee arrived at an agreement (App. 332-37) which ultimately resulted in Condition 24(a) attached by the Commission to its approval of the proposed unification (App. 22-24, 326-28).

Condition 24(a) requires Burlington Northern (called NuCo in the Merger Cases) to permit the Milwaukee, upon its application, to extend its operations to Portland and to grant Milwaukee trackage rights to operate over Burlington Northern lines between Longview Junction (the end of the Milwaukee line at that time) and Portland "including the right to serve on an equal basis all present and future industries at Portland and intermediate points and the use of NuCo facilities at Portland necessary for the switching of traffic to other railroads and industries."

Condition 24(a) was critical to the administrative and judicial approval of the Northern Lines unification. Speaking of "the newly designed competitive posture of the Milwaukee" in the *Northern Lines Merger Cases*, this Court said (396 U. S. at 516):

> The conditions imposed by the Commission's Second Report will alter that situation and substantially enlarge the Milwaukee's competitive potential between St. Paul and Minneapolis and the West Coast due to enlargement of its long-haul capability. Shippers will be afforded more flexible service. Another condition attached to the Commission's approval will permit the Milwaukee to run lines from its present western terminus into Portland, giving it a link with the Southern Pacific. All this will enable the Milwaukee to complete with the Northern Lines for east-west traffic and some north-south traffic as well as linkage with Canadian carriers to the north, which was previously the exclusive domain of one or both of the Northerns.

In short, the Commission imposed Condition 24(a), and this Court considered that it did so to make the Milwaukee a meaningful competitor of the Northern Lines. Yet in the case at bar, the Commission has refused to consider inclusion of Milwaukee in the proposed acquisition of control of a terminal line which could serve as a gateway to a new area of great present and potential traffic, and this at Portland where Milwaukee is a struggling newcomer. Without reference to any question of multicarrier ownership of interchange tracks at North Portland, the Commission could and should have ordered the Milwaukee's inclusion in fulfillment of the condition it attached to its approval of the Burlington Northern merger. The Comission's error is compounded by the brutal fact that Milwaukee is urgently in need of all the traffic it can generate.

Milwaukee will be filing with this Court a separate brief in support of its position. This brief statement of the Milwaukee situation is nonetheless sufficient to show that the Commission erred in failing to implement here the merger condition intended to make Milwaukee a meaningful competitor in the West.

3. The Commission erroneously failed to evaluate the competitive effect of excluding Southern Pacific and Milwaukee from the proposed transaction.

Section 5(11) of the Interstate Commerce Act, 49 U. S. C. § 5(11), relieves carriers and individuals participating in a § 5 transaction approved by the Commission from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as many be necessary to enable them to carry into effect the transaction.

The classic case interpreting § 5(11) is *McLean Trucking Company v. United States*, 321 U. S. 67, 87 (1944), in which the Court considered the antitrust aspects of that section. The Court concluded that

> . . . the fact that the carriers participating in a properly authorized consolidation may obtain immunity from prosecution under the antitrust laws in no sense relieves the Commission of its duty, as an administrative matter, to consider the effect of the merger on competitors and on the general competitive situation in the industry in the light of the objectives of the national transportation policy.
>
> In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operations, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy.

In the *Northern Lines Merger Cases*, *supra*, 396 U. S. at 504, this Court quoted the four factors in § 5(2) (c) which the Commission must consider in determining the public interest. It then said that

> . . . the Commission must also consider the anticompetitive effects of any merger or consolidation, because under § 5(11) of the Interstate Commerce Act any transaction approved by the Commission is relieved of the operation of the antitrust laws. *McLean Trucking Co. v. United States*, 321 U. S. 67, 83-87 (1944).

In its decision in the case at bar, the Commission made no effort whatever to inquire into the anticompetitive effect of the proposed transaction and on the general rail competitive situation in the West. Exclusion of Milwaukee and SP from Rivergate will deny to the shipping public the many benefits of competition between the railroads. Portland as an ocean port depends on inland traffic between competitive points as well as to and from local points served by the railroads reaching Portland. Likewise, Rivergate as a port and industrial facility of great capacity needs competitive rail service of high quality and wide coverage if it is to fulfill its public function as a viable instrument of commerce. The west entrance to Rivergate from Barnes Yard is now limited to UP and Burlington Northern. An east entrance through Peninsula would be likewise restricted under the Commission's decision. Such a result would plainly discourage Milwaukee and SP from developing Rivergate traffic, and competitive service would be effectively hampered. On the other hand, competition between the four trunkline railroads would assure to the public using Rivergate the many benefits of competition—good service between competitive points, good service to and from local points, the advantages of single-line service, wide choice of routes, the development of service and rate innovations, and the like. Access to new traffic generated at Rivergate can undoubtedly help to make Milwaukee a more effective competitor of the Northern Lines.

Moreover, in the rapidly changing railroad economy now in the course of reconstruction throughout the nation and in the West, the competitive position of Milwaukee and Southern Pacific *vis-a-vis* the Northern Lines and Union Pacific in the present situation should also be considered. The Commission, however, did not evaluate the anticompetitive effects of its decision in any respect.

The Commission's nonfeasance therefore calls for reversal.

4. The Commission's rejection of common use of terminal facilities pursuant to § 3(5) of the Interstate Commerce Act was based on an erroneous conclusion of law.

Thus far we have referred only to the Burlington Northern/Union Pacific application filed pursuant to § 5(2) of the Interstate Commerce Act, 49 U. S. C. §5(2). We have shown above that the Commission acted erroneously in granting that application without providing that appellants Southern Pacific and Milwaukee be included as equal owners of Peninsula and granted access to the lines of Peninsula.

In addition to the § 5(2) application, common use applications were filed by appellants Southern Pacific and Milwaukee under § 3(5) of the Act (App. 170-74, 180-83). From the point of view of the shipping public, the effect of granting the § 3(5) applications would be precisely the same as imposing access conditions pursuant to § 5(2). In both cases the result would be increased competition and availability of service by four railroads to Rivergate.

It is appellants' position that both types of relief should be granted. This is because, as the Commission recognized (App. 20, 334 I. C. C. at 425), authorizations under

§ 5(2) are permissive; if the applicants decide that the conditions imposed are too onerous, they may decline to consummate the transaction. Orders under § 3(5), on the other hand, are mandatory. Accordingly, if it is determined that all four railroads should have access to Peninsula, the only way the shipping public can be adequately protected is by coupling conditions under § 5(2) with an order under § 3(5).

The Commission disposed of the § 3(5) applications in one paragraph. It found (App. 34, 334 I. C. C. at 435-36):

> The intent of Congress in enacting section 3(5) was to provide a method of avoiding the necessity for incurring unnecessary expense in duplicating existing terminal facilities by a railroad entitled to serve a particular territory. *Cf. Use of Northern Pac. Tracks at Seattle by Great Northern*, 161 I. C. C. 699. For a more recent case, see *Seaboard Air Line R. Co.—Use of Terminal Facilities*, 327 I. C. C. 1, where one railroad was authorized to acquire common use of another's facilities in order to continue service to a port which had been removed to a new location. In the instant case, SP is not entitled to serve Peninsula or Rivergate. Therefore, there is no question of avoiding costly construction from SP's present Portland terminus to Peninsula through the acquisition of the common use rights it requests. Accordingly, we find no ground for authorizing the requested common use. (Footnote omitted.)

We point out first that the Commission's conclusion that SP is "not entitled to serve Peninsula or Rivergate" seems inconsistent with other findings made by the Commission. Thus in ruling on its power to impose conditions on § 5(2) authorizations, the Commission found (App. 25-26, 334 I. C. C. at 429):

> We do not agree with the joint applicants' contention that because SP and Milwaukee do not physically connect with Peninsula, they are not "railroads in the territory involved" within the meaning of section 5(2)(d), and, therefore, that we lack jurisdiction to require their inclusion in the title proceeding.

If SP and Milwaukee are "railroads in the territory involved," then it would seem to follow that they are "entitled to serve" Peninsula.

However, even assuming *arguendo* that the Commission correctly concluded "SP is not entitled to serve Peninsula or Rivergate," we submit that the Commission's rejection of the § 3(5) applications on this ground was erroneous as a matter of law.

Section 3(5) reads as follows:

> If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. . . .

In essence the provision states that the Commission has the power to require the use of "terminal facilities, including main-line track or tracks for a reasonable distance out-

side of such terminal, of any common carrier by railroad, by another such carrier or other such carriers . . ." It does not say that the other carrier (or carriers) must also be "entitled to the enjoyment of [the] terminal facilities." The term "other *such* carrier" refers only to the preceding phrase, indicating that the other carrier must also be a "common carrier by railroad."

By limiting consideration to Peninsula, rather than a broader geographic area, the Commission apparently reads § 3(5) as meaning that relief under that provision is only available if the railroad is already "entitled to serve" the particular terminal facilities which it seeks to reach. This narrow interpretation renders the provision of extremely limited application and is at variance with the plain language of the statute. Although the Commission refers to the "intent of Congress," it cites no legislative history to support its interpretation, and we can find none.

The only authorities cited by the Commission are two of its own decisions, neither of which squarely supports the Commission's conclusion. Indeed one of the cited cases, *Seaboard Air Line R. Co.—Use of Terminal Facilities*, 327 I. C. C. 1 (1965), is in our view solid authority for the opposite proposition.

That case involved an application by Seaboard under § 3(5) for the right to operate over trackage of Florida East Coast Railway Company in order to reach the terminal facilities of the Dade County (Miami) Sea Port Department. Florida East Coast contended that the only terminal facilities involved in the case were those owned by the Sea Port Department, which facilities Florida East Coast neither owned nor was entitled to enjoy, and thus that the trackage over which rights were sought were not terminal facilities as used in § 3(5) of the Act. The Commission,

however, rejected this argument and granted the relief requested. This action was affirmed by a three-judge court in *Florida East Coast Ry. Co. v. United States*, 256 F. Supp. 986 (M. D. Fla. 1966), aff'd *per curiam*, 386 U. S. 8 (1967).

The factual situation in the *Seaboard* case was strikingly similar to the factual situation involved here. The Commission's decision shows: that the facilities sought to be served were new port facilities, publicly owned and being constructed with public funds (327 I. C. C. at 2, 4); that it had always been the intention of the Sea Port Department that all railroads serving the area would have direct access to the port and that each carrier would be in a position to serve the port with its own equipment (*id.* at 4); that service at the port by both carriers was generally favored by the shippers (*id.* at 5); that the movement proposed over the trackage of Florida East Coast was a "straight-through movement without service to intermediate points" (*id.* at 7); that the interchange agreement proposed by the Florida East Coast did not provide adequate service because of delays and increases in switching costs (*id.* at 8); and that Florida East Coast claimed operation by Seaboard over East Coast's tracks would cause congestion (*id.* at 6). As mentioned, the requested relief was granted.

The Commission claims that this case is not applicable to this proceeding since Seaboard, the railroad seeking to acquire the common use rights, had been serving the port in its old location and thus when the port was moved to a new location which Seaboard did not serve, granting it the right to serve the new location did not constitute an invasion of another railroad's territory. (App. 34, 334 I. C. C. at 435, n. 11). Appellants submit that this is a

specious argument at best. Under the Commission's theory, whenever an industry with numerous track facilities located exclusively on railroad *x* decides to move its location to an exclusive point on railroad *y*, then railroad *x* could claim that it is entitled under § 3(5) as a matter of law to reach the new industry location over the tracks of railroad *y*. This is not the law.

Other decisions by the Commission also support the proposition that § 3(5) relief can be granted even though there have been no past rights or past ownership in the area sought to be reached. Thus in *Erie R. Co. Acquisition*, 275 I. C. C. 679 (1950), the Erie sought authorization to acquire and operate former trackage of International Railway Company. The latter company, by contract, operated over trackage of New York Central to reach an industrial area called Lower Town. The agreement between International and New York Central was not assignable and New York Central refused to make a similar arrangement with Erie. Erie then sought authority under § 3(5) for rights over the New York Central line into Lower Town. The Commission granted the relief requested.

In short, contrary to the Commission's holding, there is no requirement that the railroad seeking relief under § 3(5) actually be entitled to serve the terminal facilities sought to be reached. The Commission's holding on this point is contrary to the plain language of the statute and to its own decisions in other cases.

Conclusion

For the foregoing reasons, appellants respectfully submit that the judgment of the district court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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APPENDIX A

EXCERPTS FROM INTERSTATE COMMERCE ACT

National Transportation Policy

[49 U. S. C., preceding § 1]

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

* * *

§ 3(4) Interchange of traffic.

All carriers subject to the provisions of this chapter shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of

passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this chapter or any common carrier by water subject to chapter 12 of this title.

* * *

§ 3(5) Terminal facilities; use of and compensation for.

If the Commission finds it to be in the public interest and to be practicable without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be

entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

* * *

§ 5(2) Unifications, mergers, and acquisitions of control.

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify

the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the person specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the

public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

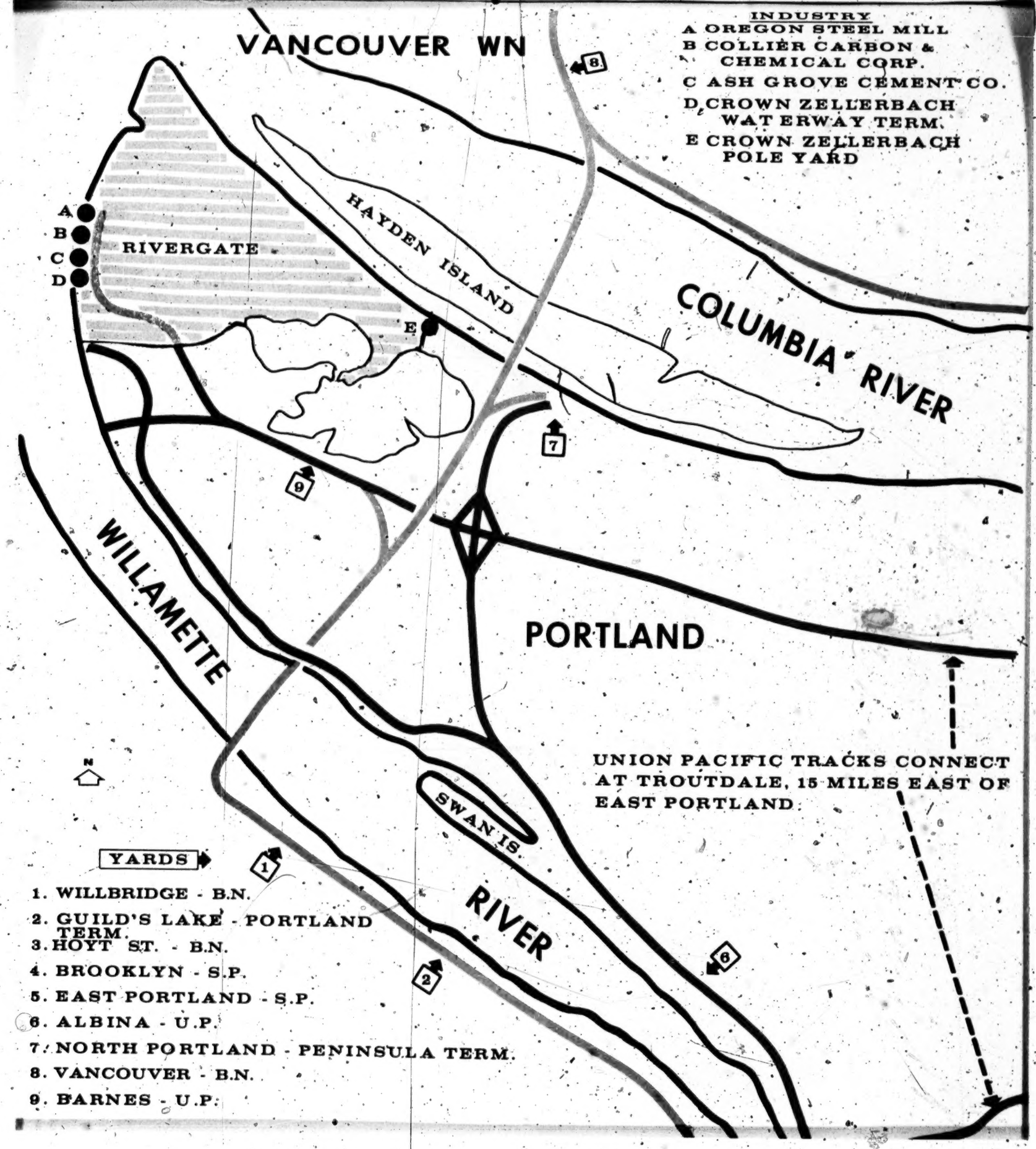
(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

* * *

§ 5(11) Plenary nature of authority under section.

The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or

authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any State.


VANCOUVER WN
INDUSTRY
A OREGON STEEL MILL
B COLLIER CARBON & CHEMICAL CORP.
C ASH GROVE CEMENT CO.
D CROWN ZELLERBACH WATERWAY TERM.
E CROWN ZELLERBACH POLE YARD
A
B
C
D
RIVERGATE
HAYDEN ISLAND
E
COLUMBIA RIVER
WILLAMETTE
PORTLAND
N
SWAN IS.
RIVER
UNION PACIFIC TRACKS CONNECT AT TROUTDALE, 15 MILES EAST OF EAST PORTLAND.
YARDS
1. WILLBRIDGE - B.N.
2. GUILD'S LAKE - PORTLAND TERM.
3. HOYT ST. - B.N.
4. BROOKLYN - S.P.
5. EAST PORTLAND - S.P.
6. ALBINA - U.P.
7. NORTH PORTLAND - PENINSULA TERM.
8. VANCOUVER - B.N.
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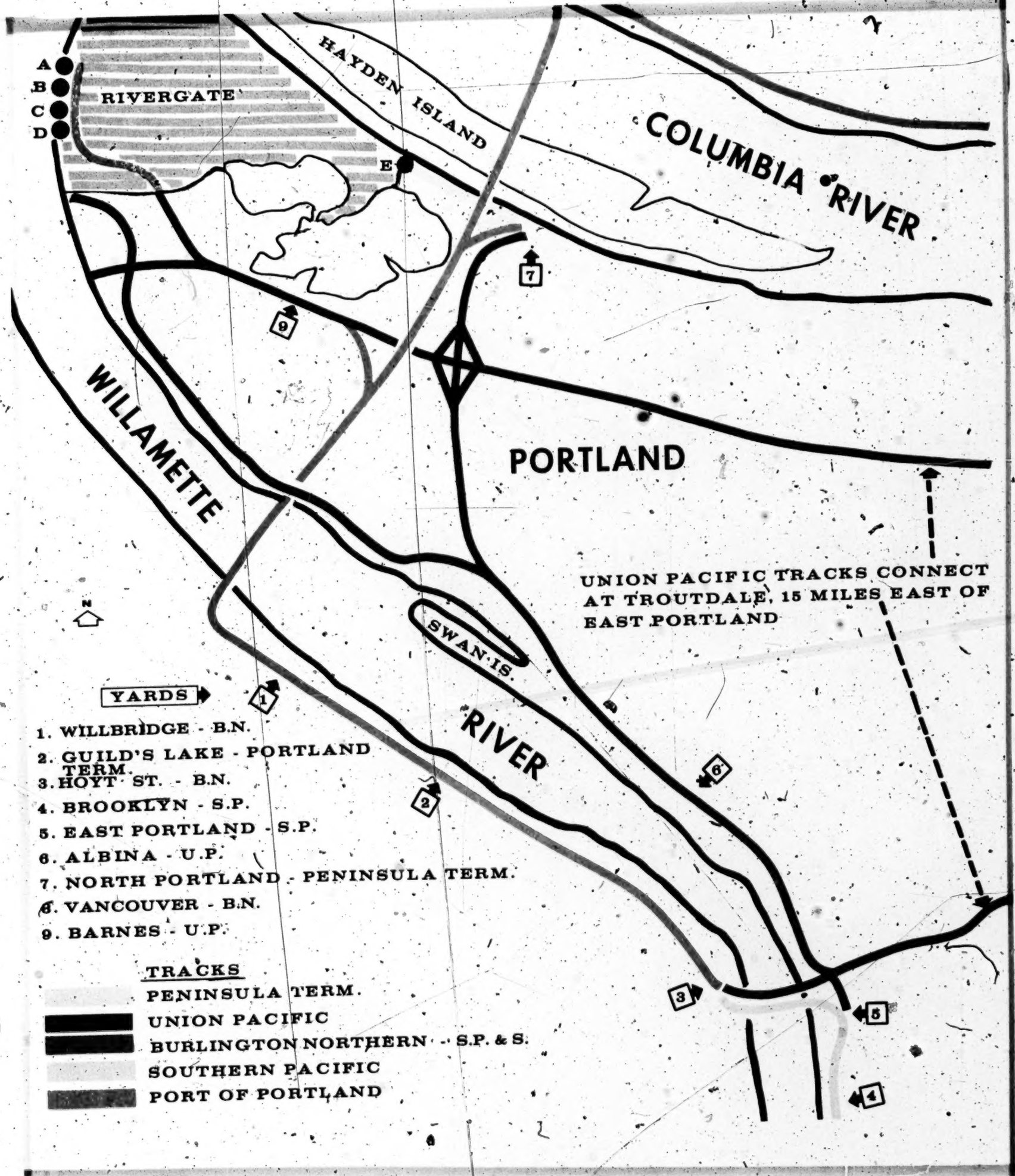
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TRACKS
PENINSULA TERM.
UNION PACIFIC
BURLINGTON NORTHERN - S.P. & S.
SOUTHERN PACIFIC
PORT OF PORTLAND